A WORD ABOUT COMMISSIONS.

WE have entered into an age which is wholly out of sympathy with the old *laissez faire* doctrine. It is apparent that everywhere and on every hand the state is beginning to deny that a man may do as he pleases with what he may call his own. The business man no longer may manufacture his drugs or his paints or his food products as he may desire. The state has stepped in and told him that there are certain things that he must do, and that there are other things that he must not do. The public service corporations everywhere have either felt, or are beginning to feel, the iron hand of a strong government; and though for years they attempted to resist and to struggle from under the control that the government was endeavoring to assert, they are now gradually, though begrudgingly, beginning to yield to public pressure. Every day our government is apparently adding to its own functions or developing, to an extent unthought of a half-century ago, its old ones. Each day our government is becoming more comprehensive and more complicated because the state is enacting new laws regulating our industrial and our social welfare.

A representative in one of our state legislatures may have had some poor success in the quality of paint he has used on his farm barn. He believes that the paint was adulterated, and that his constituents as well as the entire population of his commonwealth have been continuously and steadily duped and defrauded by what he emphatically calls the paint trust; so he promptly, and possibly hastily, prepares a bill for the creation of a paint commission, whose duty it is to pass upon the question of what constitutes pure paint (though the purest of paints may contain poisonous ingredients), the manner of the sale of the pure article and the condemnation and destruction of the impure one, and the methods of enforcing the law itself. If one of our legislators does not like the way in which our large public utility corporations may be running matters, the schedules that may have been prepared by the railroads for intrastate business, the quality of gas that he may be getting or the price that the gas company may be charging for it, a bill is presented in the state legislature and a new law is enacted for the

creation of a public service commission. We have factory commissions and labor commissions; we have commissions to hire and discharge our city employees. We have commissions and boards of health to pass upon the food that may be set before us and the drugs that we all try to keep away from; commissions to regulate municipal dance halls, bathing beaches and parks, and child labor. On every hand, just as we have numerous commissions to regulate our industrial welfare, so, too, we have commissions to pass upon our social welfare.

The commission which has had given to it the right to regulate an entire industry has a far-reaching power. The commission that controls and regulates the management of all the public utilities of a state has in its hands the regulation of business and the limiting of profits on business, involving untold millions. So, too, the happiness and well-being of thousands may be deeply affected by commissions looking after our social welfare.

In every walk of life man is tending to specialize. The lawyers have divided and subdivided their profession into small parts, and many are satisfied to take one of these parts and to master it. We are inclined to sneer at the general medical practitioner, for we feel that the whole field of medicine is too big for one man to comprehend. For the purpose of specialization, the medical practitioner has not only divided the body into its separate organs, but even the sexes have been divided, and now man is being classified according to his age.

If in law and in medicine and in science there are specialists, why should there not be specialists in government? Is government such a simple matter that one man may comprehend it all? Can one person or group of people have such a universal knowledge of society and industry at large, in all its intricacies and perplexities, as to be able to give us the most efficient government? We know better than this. For a long time we have believed that a few men who have devoted their entire time to a few duties will learn to understand those duties and to perform them better than if their time and energy were dissipated in the execution of many duties. The public sees that a legislative body that comes into existence in a more or less haphazard manner, in the very nature of things has too many matters coming before it to regulate with any satisfaction, in detail, even one of our industries. Public opinion has

made our legislatures realize this fact, and to-day they are glad to delegate in a large measure some of their former functions to various commissions who may have specialized in a limited field. A commission that specializes may act, and often does act, as a watchdog to see at all times that its rules and regulations are carried out. The commission has the time to go into details of fact and to draw a conclusion that may bear weight. The commission has been found to be a satisfactory expedient. There are so many commissions touching our social and industrial welfare at so many points, that it may be worth our while to examine into their position from a legal point of view.

At the outset, the question arises as to the nature of the duties of a commission. If a commission is an administrative body or a legislative body, then the course of procedure before it is likely to take an entirely different form from that it would take were it a judicial body. An administrative or a legislative body is not likely to follow the technical rules of evidence. Lawyers themselves, who have more or less to do with molding the forms of procedure, are in the one case less likely to press upon the commission that it should follow the intricate procedure of the law of evidence than in the other.

Are the acts and the doings of the ordinary commission legislative, executive, or judicial? In an interesting case before the Supreme Court of the United States,[1] the court went quite extensively into the question whether the duties of the State Corporation Commission of Virginia were judicial or legislative. The constitution creating the commission provided that it should have the power and be charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in the state, in all matters relating to their performance of their public duties and their charges therefor, and of correcting abuse thereof — to enforce such rates, charges, rules, and regulations, and require the companies to maintain such service facilities and conveniences as might be reasonable, and to prevent unjust discrimination. The act further provided that the commission should have the power to administer oaths, compel attendance of witnesses, and to punish for contempt. There were further pro-

[1] Prentis *v.* Atlantic Coast Line, 211 U. S. 210, 29 Sup. Ct. 67 (1908).

visions in the act giving it certain powers to enforce its findings. There the court, in its opinion by Mr. Justice Holmes, said:

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by Section 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind, as seems to be fully recognized by the supreme court of appeals (Com. *v.* Atlantic Coast Line R. Co., 106 Va. 61, 64, 7 L. R. A. N. S. 1086, 117 Am. St. Rep. 983, 55 S. E. 572), and especially by its learned president in his pointed remarks in Winchester & S. R. Co. *v.* Com., 106 Va. 264, 281, 55 S. E. 692."

The court cited other authorities in support of this proposition.

Chief Justice Fuller, while agreeing with the conclusion of the court, dissented from the opinion. He was of the belief that the act was a judicial one, not legislative. In the course of his opinion he said:

"The Virginia State Corporation Commission was created and its functions, powers, duties, and the essentials of its procedure were prescribed in detail by the Constitution of the State as well as by statute. It was made primarily a judicial court of record of limited jurisdiction, possessing also certain special legislative and executive powers. When it proposed to make a change in a rate of a public service corporation, or otherwise to prescribe a new regulation therefor, the commission was required, sitting as a court, to issue its process, in the nature of a rule, against the corporation concerned, requiring it to appear before the commission at a certain time and place and show cause, if any it could, why the proposed rate should not be prescribed. The judicial question involved on the return to such rule was whether or not the contemplated rate was confiscatory, or otherwise unjust or unreasonable, and in the hearing and disposition of this question the proceedings of the commission, as prescribed by law, were in every respect, the same as those of any other judicial court of record. It issued, executed, and enforced its own writs and processes; it could issue and enforce writs of *mandamus* and injunction; it punished for contempt; and kept a complete record

and docket of its proceedings; it summoned witnesses and compelled their attendance and the production of documents; it ruled upon the admissibility of evidence; it certified any exception to its rulings; and its judgments, decrees, and orders had the same force and effect as those of any other court of record in the state, and were enforced by its own proper processes. It was not subject to restraint by any other state court, and from any and every ruling or decision by it an appeal lay to the supreme court of appeals of the state, and was heard upon the record made for and certified by the commission, exactly as in the case of appeals from any other court; and, pending the decision of such appeal, the order appealed from might, by *supersedeas*, be suspended in its operation."

Mr. Justice Harlan was also of the opinion that the act of the Virginia State Corporation Commission was in every sense judicial.[2]

A similar question arose as to the nature of the acts of the Public Service Commission in the State of New York.[3] There the court, after reviewing the Prentis case, expressly held the acts of such a commission judicial and not legislative. The court expressly denied that the acts of the commission were necessarily non-judicial because it enforced or attempted to enforce a rule of conduct for the future. It pointed out that a judicial decision often determines in advance what future action will be a discharge of all existing liabilities or obligations. Thus, it pointed out that in the specific enforcement of contracts which are to extend over a long period of time the court may dictate the details of performance. The court also indicated that in actions for divorce or separation it is the constant practice of the courts to prescribe for the custody and care of children and to provide for the subsequent modification of such provisions from time to time as circumstances may necessitate.

On the other hand, there have been a vast number of the most eminent authorities that have held that the functions of a commission are purely administrative. In giving its opinion to the Massachusetts House of Representatives as to the constitutionality of the Civil Service Law of that state[4] the Supreme Judicial Court of Massachusetts said:[5]

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[2] See also Interstate Commerce Commission *v.* Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479, 17 Sup. Ct. 896 (1896).

[3] People *ex rel.* Railroad *v.* Willcox, 194 N. Y. 383, 87 N. E. 517 (1909).

[4] Laws of 1884, c. 320.

[5] Opinion of the Justices, 138 Mass. 601 (1885).

"The object of the statute before us is to provide for a board of commissioners, who shall make rules for the selection of persons to fill such offices in the government of the Commonwealth, and of the several cities thereof, and supervise the administration of such rules. We think the Legislature has the constitutional right to provide for the appointment of such commissioners, and to delegate to them the power to make rules, not inconsistent with existing laws, to guide and control their discretion and the discretion of the officers of the State or of the cities in whom the appointing power is vested. This is not a delegation of the power to enact laws; it is merely a delegation of administrative powers and duties, and there is no provision of the Constitution which prevents the Legislature from enacting that such rules, when duly made, shall be binding upon the officers and citizens to whom they apply, and that they may be enforced by suitable penalties, as provided in the last section of the statute."

The United States Supreme Court apparently agreed with this view of the law in the case of Stone *v.* Farmers' Loan & Trust Company.[6]

In the case of the City of Aurora *v.* Schoeberlein [7] the Supreme Court of the State of Illinois passed upon a clause of the Civil Service Act of 1903 which permitted an appeal to the circuit court from any decision of the commission discharging an employee, and which permitted the circuit court to set aside the findings of the commission. The court held that this section of the act was unconstitutional for the reason that the government of the state of Illinois was divided by the constitution into three separate functions,—legislative, executive, and judicial; that the removal of an officer in a civil service proceeding was an executive act, and that the allowance of an appeal to the circuit court for the purpose of reviewing an executive act was vesting the circuit court with executive powers, which was contrary to the constitution of the state.[8]

And the United States Supreme Court, in a line of cases where the acts performed were of a similar nature, has held them to be administrative. Thus the United States Supreme Court, in a decision rendered by Mr. Justice Brewer, in the case of Burfenning *v.* The Chicago, St. Paul, etc. Ry. Co.,[9] strongly intimates that

[6] 116 U. S. 307, 336, 6 Sup. Ct. 334, 338, 1191 (1886).
[7] 230 Ill. 496, 82 N. E. 860 (1907).
[8] See also Wyman, Public Service Corporations, § 1404, p. 1235.
[9] 163 U. S. 321, 16 Sup. Ct. 1018 (1896).

the Land Department in passing upon the question whether a certain tract of land was swamp land or not, saline land or not, mineral land or not, was passing upon an administrative question. In the case of American School of Magnetic Healing *v.* McAnnulty,[10] the United States Supreme Court held that the Post Office Department, in passing upon the question of whether certain printed matter should be excluded from the mails on the ground that it was fraudulent, was performing a purely administrative act. So, too, the United States Supreme Court, in a number of cases involving the rights and powers of an immigration inspector, has invariably been inclined to hold that his duties were administrative. The most important case upon this subject probably is United States *v.* Ju Toy.[11] In that particular case the petitioner filed a petition for a writ of *habeas corpus*, and alleged that he was about to be wrongfully deported on the ground that he was an alien, born in China, while in fact he was a native-born citizen of the United States. It appeared, however, that the immigration inspector had taken evidence and decided that the petitioner had not been born in the United States, and had denied him admission to the United States and ordered him deported. It would be hard to support this case on any theory other than that the act of the immigration inspector was an administrative one, and all the more so for the reason that the court held that if the inspector had not abused his authority the act of the department must be absolutely final and conclusive, and that even though the question of citizenship might be raised, the court had no power to review such finding.

The question of what may constitute a just and reasonable rate is necessarily a question of fact to be determined from a mass of intricate facts. The question of what may or may not be a pure food, or what may constitute a pure drug, or what may or may not be an adulterated paint, is likewise a conclusion of fact to be drawn from a group of facts somewhat less complicated. Whether a civil service employee has disobeyed the rules established by a civil service commission or the head of a department, or is so inefficient in his work that he should be discharged, necessarily is a similar conclusion. This must likewise be true of the duties of an immigration inspector when he passes upon the question of a man

[10] 187 U. S. 94, 108, 23 Sup. Ct. 33 (1902).

[11] 198 U. S. 253, 25 Sup. Ct. 644 (1905).

seeking admission to this country as an alien or as a citizen. It would seem to follow that the duties of all these bodies are one and the same, and that if some are administrative in their nature, others likewise must be administrative. These commissions are doing the duties of highly specialized juries. They are passing upon and resolving very important questions of fact. Of course if a commission is to have any authority whatsoever, it must have the right to compel the attendance of witnesses, and the power to punish witnesses or to cause their punishment in the event of their refusal to attend. It must be taken for granted that if the acts of a commission are to have any weight, it must have some power to enforce its findings. Consequently, the reasons that some of the judges of the United States Supreme Court gave in the Prentis case why the Virginia State Corporation Commission is a judicial body do not seem to be conclusive.

It should be noted that commissions only in a limited sense pass upon property rights. They do not decide that a certain property belongs to A. or to B. They do say that certain property that belongs to A. can be used by him only in a certain way. They tell public service corporations how they must run their trains, or what rates they may charge in the sale of their gas or electricity, or whether they may establish new rates or not. They tell those who manufacture drugs or food products that they can sell them only if they do not contain certain ingredients. The right to hold an office may or may not be regarded as a property right, but even in those states where it is regarded as one, nevertheless, all that a civil service commission does is to see to it that the man who holds his office complies with the rules, and both does the things that are required of him and abstains from doing those acts that are forbidden. In other words, a commission merely passes upon the method that a man must adopt in using what belongs to him.

Every legislative body has the power to enforce obedience to its *subpœna* and to compel witnesses to testify before it. The land commission, the immigration inspectors, and the civil service commission, have a like power. Would it not be better to say that legislative, administrative, and judicial bodies, if given the authority by the legislature, may compel witnesses to come before them and to attend, than to hold that because such a body has that power it is therefore a judicial body?

Nor does it seem clear that the majority of the court in the Prentis case was correct in holding the commission a legislative body. The real test that the court applied was that the commission had authority to make rules and regulations. It is almost fair to say that every civil service commission in the United States has this same power. Nevertheless, it is apparent that the civil service commission in its nature is administrative. It must be conceded that civil service commissions have merely taken over certain powers that were formerly given to the administrative head of the government. The mayor of a city or the governor of a state where there is a civil service act has been shorn of his power, for the most part, to appoint employees or to remove them. This was a power he had in the past. Certainly in the past, when the head of the government exercised this power, it was not a legislative function. The legislature has taken this function from him and placed it in the hands of an impartial body. It has transferred from one head to another certain administrative powers. In creating civil service commissions the legislature transfers the employment bureau of the government to a new body. Formerly the mayor or governor may have made certain rules on which he based the appointment, advancement, and removal of employees. This is exactly what the civil service commission does after it is once constituted. But in the nature of things does it follow from the mere fact that the law gives it the express right to make such rules, that therefore the legislature made it a legislative body?

A court is given the right to make its rules, to guide it and to aid it in the management of the business that comes before it. These rules very often are of the greatest importance, but no one has ever been inclined to hold that because a court may make rules and regulations governing either it or litigants, it is therefore a legislative body. It therefore does not seem a fair test to hold that because a body may make rules and regulations, it is a legislative body.

If a commission is regarded as an administrative or a legislative body on the one hand or a judicial body on the other, not only may we expect to see a different development in the method of its procedure and in the rules of evidence that will prevail and in the method of reviewing the findings of its decisions, but we are also likely to see a substantial difference in the nature of the men who may be

appointed to constitute such commissions. If it is a judicial body, then it seems to be highly important that its members may be those who are versed in law, in order that they may correctly interpret the law of the land. If it is a judicial body, then questions of law are more likely to be emphasized. If, however, the commission is regarded as an administrative body, then the legal features will be minimized; then it will not be necessary that those who may be its members be versed in the substantive and adjective law of the land. The law will not be emphasized. Men then will be more likely to be appointed to its membership who have specialized in that particular part of our industrial and social life that the commission is called upon to regulate; and it is highly important that this should be so. There is no reason why a lawyer should be of any particular aid in determining what may be a fair and remunerative rate for a public service corporation. There is every reason, however, why a man who has given a life study to gas, electric and power plants, and to railroads may be of the greatest assistance in establishing a fair rate. If our commissions are to be of value, it is to be hoped that those who are appointed to them will be experts, and that in reaching their conclusions they will not be hindered by the vexatious delays of legal technicalities.

An administrative body will probably listen to hearsay evidence and give it such weight as it considers it worth. It may dispense with the technical proof of the execution of documents or of signatures; it may hear witnesses of either side in such order and at such times as it may see fit. On the other hand, a judicial body is quite likely to find itself bound by the rules of evidence, and to have its decisions and findings reversed if it allows improper evidence or refuses to permit proper evidence as determined by the forms and standards of law. If the commission is regarded as an administrative body, the conclusion of the commission on the question of fact should not be subject to review by a court unless such conclusion in some way violates a law of the land. It should not be subject to attack because in the eyes of the court it may or may not have been sustained by the weight of the evidence presented. In the event, however, that the commission is a judicial body, the conclusion is more likely to be set aside because it was not sustained by the preponderance of evidence that may have been introduced. So, too, if the functions of a commission are regarded as judicial on

the one hand or executive on the other, there is likely to be a great difference in the law of appealing from or reviewing the findings and decisions of the commission. The law seems to have been fairly and definitely settled as to the powers of the court to review and set aside the findings of the commission where it has been held to be an administrative body. It is not clear, however, what the powers of a higher court may be in reviewing or setting aside the findings of a commission where it is regarded as a judicial or legislative body.

In the case of Burfenning *v.* Chicago, St. Paul, etc. Ry.,[12] the Supreme Court held that the findings of the land commission were final and could not be reviewed. The court said in that opinion that it had been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final.[13] This has been affirmed by a long series of cases.[14]

So, too, in the immigration cases, where the immigration inspector passes upon one of the most important of all possible questions from a governmental point of view — that of citizenship — it has been held that his finding is not subject to review. In the case of United States *v.* Ju Toy,[15] the immigration inspector had held that the petitioner was an alien, born in China, and that he was admitted to come into the United States in violation of the immigration act, and therefore had ordered him to be deported. The court, in a decision rendered by Mr. Justice Holmes, there held that the decision of the department was final, whatever the grounds on which the right to enter the country was claimed. And the court was apparently of the opinion that the decision of the Secretary of Commerce and Labor in the matter was conclusive and not subject to review.[16]

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[12] 163 U. S. 321, 16 Sup. Ct. 1018 (1896).

[13] See Bates & Guild Co. *v.* Payne, 194 U. S. 106, 24 Sup. Ct. 595 (1904); Heath *v.* Wallace, 138 U. S. 573, 11 Sup. Ct. 380 (1891).

[14] See American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94, 23 Sup. Ct. 35 (1902); Public Clearance House *v.* Coyne, 194 U. S. 497, 508, 24 Sup. Ct. 789 (1904).

[15] 198 U. S. 253, 25 Sup. Ct. 644 (1905).

[16] See also Edsell *v.* Mark, 179 Fed. 292 (1910); Lem Moon Sing *v.* United States, 158 U. S. 538, top p. 544, 15 Sup. Ct. 967 (1895); United States *v.* Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621 (1903); Yamataya *v.* Fisher, 189 U. S. 86, 23 Sup. Ct. 611 (1903).

In the State of Illinois this point has been established by innumerable decisions. Thus in the case of People *ex rel.* Hayes *v.* City of Chicago [17] the court said:

"It makes no difference whether the review is attempted by *certiorari* or in a petition for *mandamus*; the inquiry on our part and on the part of the Circuit and Superior Courts is limited to the questions whether the Commission had jurisdiction and whether it followed the form of procedure legally applicable in such cases. This is what the Supreme Court said in People *v.* Lindblom, 182 Ill. 241, and we have repeated in the Heaney case and in other cases.

"With the justice or injustice of the Commission's findings and sentence the courts have nothing to do, nor with the severity of the punishment, provided always that the findings and action are within its jurisdiction and the proceedings regular."

And numerous authorities have held that an administrative commission is not bound by the ordinary technical rules of evidence or procedure.[18]

To make the working of our commissions efficient and expeditious in order that they may give satisfaction to the community as a whole, and be a benefit to our times, they must be relieved from the technicalities and delays that have surrounded our courts. Technicality has been the mother of delay in our courts. In this great branch of our government the law is at the threshold of new interpretation. It is to be hoped that these laws will be interpreted in a broad and comprehensive manner so that the working of the commission will not be interfered with, and may result in the greatest possible benefit to us.

The death-knell of the *laissez faire* doctrine that prevailed at the end of the eighteenth century and the beginning of the nineteenth century has been sounded. The commission has been instrumental in burying it. It is developing, as a public servant, the technical man. Commissions have been created where technical knowledge

[17] 142 Ill. App. 103 (1908).

[18] See Joyce *v.* City of Chicago, 216 Ill. 466, 75 N. E. 184 (1905); City of Chicago *v.* People *ex rel.* Gray, 210 Ill. 84, 92, 71 N. E. 816 (1904); People *ex rel.* Maloney *v.* Lindblom, 182 Ill. 241, 244, 55 N. E. 358 (1899); People *ex rel.* Weston *v.* McClave, 123 N. Y. 512, 25 N. E. 1047 (1890); Avery *v.* Studley, Mayor, 74 Conn. 272, 50 Atl. 752 (1901); State *ex rel.* McDonald *v.* Corteney, 23 S. C. 180 (1885). An analysis will show that the United States immigration, land, and post office cases are to the same effect.

is of the greatest possible value and necessity. So long as commissions continue to give satisfaction, we must expect that the public will demand new commissions from time to time touching new branches of industry and society. And so we are rapidly coming to be governed by commissions.

Herbert J. Friedman.

CHICAGO, ILL.